IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1942.

NO. 172

MINNIE REESE RICHARDSON WRAGG,
Petitioner,

vs.

FEDERAL LAND BANK OF NEW ORLEANS.

REPLY BRIEF OF THE PETITIONER

JACK CRENSHAW,
WALTER J. KNABE,
and ELMER McCLAIN,
Attorneys for Petitioner.

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A PRELIMINARY STATEMENT

Three facts are stated in the respondent's statement of the case which are not fully sustained by the record. 1. It is stated that in 1934, the respondent, Federal Land Bank of New Orleans, sold and conveyed to petitioner the land in question and took a purchase money mortgage. While the mortgage in question is referred to as a purchase money mortgage (Record P. 25, 26), nevertheless it was executed on October 15, 1934, and it plainly appears from the record that petitioner had an interest in the property prior to that time for the petitioner was entitled to credit on this so-called purchase money mortgage for rent for the years 1933 and 1934, antedating the so-called purchase money mortgage (Rec. P. 30).

2. It is also stated in respondent's statement of the case that the petition to reopen the farmer-debtor proceedings was filed two years "lacking one day" after the title to the property had passed from petitioner. The fact is it was filed nearly six weeks prior to the expiration of two years. The petition to reopen was filed on March 11, 1940. Although the property was put up for sale on March 12; 1938, the respondent bid only $2500.00 (Rec. P. 28), and on objection of petitioner, the District Court refused

to confirm the sale at this price. The sale was finally confirmed on April 21, 1938, some six weeks later, at nearly double the original bid, or for $4,500.00 (Rec. P. 28).

3. It was further stated in respondent's brief (Respondent's brief, page 5), that the petition to reopen was filed "eleven months and eight days after Storrs had been put in possession of the property". Actually there is no statement in the record of just when Storrs went into possession. The offer to purchase (R. 35) provides that the respondent was to deliver possession "on or before the 15th day of March 1940" (R. 37) and interest on the unpaid balance was to start on that date (R. 36). This was 4 days *after* the date of the filing of the petition.

It seems significant that the respondent had in mind that the right of redemption would expire on March 12, 1940, and that the principal payment of $500.00, which with the $200.00 previously paid made the 20% of the purchase price, was not to be paid until March 15, 1940, and possession was not to be delivered to the purchaser until March 15, 1940. We believe a fair inference is that both respondent and Storrs realized that this debtor was going to do something, if she could, to get her farm back.

REPLY TO RESPONDENT'S ARGUMENT
RESPONDENT'S PROPOSITION III

The third proposition in respondent's brief is that the right of redemption in Alabama is not such a right as is included within the provisions of Section 75 of the Bankruptcy Act. This argument is here answered first because it is new and was not touched upon in Petitioner's original brief. It was not heretofore advanced by respondent, though in the District Court and in the Circuit Court of Appeals, respondent was represented by counsel living and practicing in Alabama. The fact that those most familiar with Alabama law did not advance this argument seems to us significant.

By this third proposition, the respondent asks this Court to emasculate the language of Section 75 and to hold that the ex-

press words of the statute "any right or equity of redemption" do not include the right of redemption accorded to mortgagees by the statutes of Alabama.

This Court has consistently recognized the broad purposes of Section 75 to afford relief to farmer debtors who find themselves in economic distress. The Court has consistently refused to permit this broad program of rehabilitation of distressed farmers to be emasculated by a strict construction of the law for the benefit of the creditor. "Rather the Act must be liberally construed to give the debtor the full measure of relief accorded by Congress lest its benefits be frittered away by narrow formalistic interpretations which destroy the spirit and letter of the Act." (*Wright v. Logan*, 315 U. S. 139)

This argument of the respondent is based on the assumption that the words of Section 75 "the right or the equity of redemption" apply only in those states where the right of redemption is construed to be property.

This question, we submit, is to be determined by the construction of Sec. 75, and not by the State law. The Bankruptcy statutes may regulate relationships between debtor and creditor, regardless of whether this involves the administration of "property". (*Wright v. Union Central Life Insurance Company*, 304 U. S. 502, 514, 516.

We believe, however, that an examination of the Alabama cases shows that the statutory right of redemption is "property" which can be and is administered under the Bankruptcy statutes. The early cases in Alabama, including cases in which the question was presented of whether the statutory right of redemption was subject to levy and sale upon execution held that the right was not property and therefore not subject to levy and sale. Prior to the Code of 1907, the statutory right of redemption was not assignable. By section 5746 of the Code of Alabama of 1907, the statute was amended so as to permit redemption not only by the debtor but also by a vendee of the debtor or assignee of the equity or statutory right of redemp-

tion, as well as the wife, widow, child, heir at law, devisee, or any vendee or assignee of the right of redemption. This amendment makes entirely inapplicable the decisions prior to the decision of *Johnson v. Davis*, 60 So. 799. In that case, it was held that under the statute as amended in 1907, the statutory right of redemption could be exercised by the trustee in bankruptcy who was an assignee.

Respondent cites the case of *Wittmeier v. Cranford*, 73 So. 981, which, following the case of *Leith v. Galloway Coal Company*, (189 Ala. 204, 66 So. 149), held that the right of redemption did not extend to an assignee of the trustee in bankruptcy. Respondent, however, does not call to the attention of the Court the later case of *Toney v. Chenault*, 204 Ala. 329, in which the Supreme Court of Alabama stated that in the case just referred to of *Leith v. Galloway Coal Co.* an erroneous construction was accorded the statute in interpreting it as limiting to the debtor only the authority to assign the statutory right of redemption and to that extent expressly overruled it.

Following the amendment by which the statutory right of redemption could not only be willed, but could be assigned and exercised by a vendee or assignee, two of the Justices of the Supreme Court of Alabama decided that the statutory right of redemption was property. *Peterson v. Holmes*, 202 Ala. 115, 79 So. 581; *Branson v. Adams*, 202 Ala. 442, 80 So. 826.

The conclusion was there reached that since the right of redemption was transferrable either before or after foreclosure as a property right that the right of redemption fell within the common definition of property as the right to possess, use, enjoy or to sell or otherwise dispose of a thing according to the will of the owner, without diminution or control save only by the laws of the land."

If this construction had been followed by the other members of the Supreme Court of Alabama, it would have rendered the statutory right of redemption subject both to taxation and to levy and sale. Also, as in the case of *Whiteman v. Tabor*, 203

Ala. 496, it was doubtful whether a wife could assign her statutory right of redemption without the husband joining therein.

Justice Mayfield, then a member of the Supreme Court of Alabama, retired from the bench and became Code Commissioner and as such wrote into the Code of 1923 for the first time the statute which now appears as Section 743, Title 7 of the Code of Alabama. Although this section expressly denominates the statutory right of redemption as a mere personal privilege and not property or property right, the logic of the conclusion of Justices Sayre and Thomas in the case of *Peterson v. Holmes*, 202, Ala. 115, is still applicable, for regardless of what the right is called, it remains a right which may be transferred by inheritance, by will or by sale; it is a right which may be exercised either by the immediate assignee or by an ultimate vendee. We suggest that what respondent deems to be a restriction of the rights of a mortgagor in Section 743 of the Alabama law is rather a protection of such rights by creating immunity from seizure of the right of redemption by his creditors through attachment, execution, or other process.

We think the decision in *Crawford v. Horton*, 234 Ala. 439, 175 So. 310, decided in 1937, while Section 743 of Title 7 was in effect, reinforces the preceding statement. In that case a bankrupt owned a right of redemption. This right was abandoned to the bankrupt by the trustee in bankruptcy, and the bankrupt sold the right of redemption. The purchaser of this right sought to redeem the property, and the holder of the property questioned the right of the purchaser to redeem. The Alabama Sureme Court held that the trustee could waive this right to the bankrupt and gave as its reason that a trustee can abandon "property" which is burdensome. Further the Court stated what constituted waiving "property" rights. While the Alabama Court does not specifically call the right of redemption "property", nevertheless it inferentially calls it property. This case incidentally involved the Federal Land Bank, respondent in this case, and apparently involved a contract of sale identical with the present contract with Storrs.

We have at some length and for the convenience of the Court given this digest of the Alabama authorities with reference to the statutory right of redemption. We submit, however, that whether the Alabama Court called the statutory right of redemption a personal privilege or a property right, it is, nevertheless, a "right of redemption" squarely brought within both the letter and the spirit of Section 75 (n) of the Bankruptcy Act.

While we feel that the case of *Crawford v. Horton*, just referred to, makes clear that the Alabama Court considers the right of redemption as property, regardless of this, Section 75 (n) of the Bankruptcy Act makes it property for the purposes of the Act. The Act reads in part:

> "75 (n) The filing of a petition shall immediately subject the farmer and all his property . . . for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in such property including among others, contracts for purchase, contracts for deed, or conditional sales contracts, the right or equity of redemption . . . In all cases where . . . the period of redemption has not or had not expired . . . the period of redemption shall be extended . . . for the period necessary for the purpose of carrying out the provisions of this section . . ."

The Senate Committee on the Judiciary, in its report (S. R. No. 985), 74th Congress, 1st Session, P. 1, gave the following explanation of the amendment:

"This bill has for its object the clarification of Section 75, and the rewriting of subsection (s), which has been held unconstitutional, so as to conform to the decision of the Supreme Court. We shall first discuss the amendments to Section 75, other than subsection (s).

"These amendments have become necessary because of the great confusion caused by the diverse rulings of the various United States district courts, in the construction of section 75.

Some courts have held that the farmer debtor could not take advantage of the act after foreclosure sale, and during the period of redemption. Some of these courts have refused to permit the farmer in that position to file his petition, although under the law of the State, he was in possession and full control of the property, and could redeem it within the period allowed. Other courts have held that the farmer could not take advantage of the act during the period of a moratorium established by a State; while others have held that the debtor could not take advantage of the act after sale, but prior to confirmation of sale although in all of these cases, if the debtor had the money, and were in a position to pay, he could redeem and save his property.

"Obviously, these courts are reasoning too technically, and have failed to carry out the intention of Congress, which was to protect the farmer's property and home. Other courts have held just the opposite, and have given full protection, and carried out the intent of Congress. There should be uniformity. The amendment to subsection (n) remedies this situation. In addition, subsection (n) brings all of the bankrupt's property, wherever located, under the absolute jurisdiction of the bankruptcy court, where it ought to be. Any farmer who takes advantage of this act ought to be willing to surrender all his property to the jurisdiction of the court, for the purpose of paying his debts, and for the sake of uniformity."

Any interpretation that the right of redemption is not included under Section 75 would render this part of the broad program for the rehabilitation of distressed farmers without meaning in the State of Alabama. Certainly Congress did not intend to extend to the farmers of other States a hope of rehabilitation, a right to an extension of the period of redemption for the length of time necessary to carry out the humane purpose of this statute, but to deny that right to the farmers of Alabama.

Petitioner feels that there is no question that she has the right to refile a petition as long as any rights remain. We have been unable to find a Supreme Court case so holding, but the Circuit

Courts of Appeal have apparently uniformly held that cases could be refiled. *Summers v. Collector*, 92 Fed. 2, 819; *Lemm v. Northern*, 93 Fed. 2, 709; *Buss v. Prudential*, 126 Fed. 2, 960; *Howell v. Federal*, 92 Fed. 2, 703.

Arnold v. Equitable Life Assurance Society, 100 Fed. (2d) 621;
In reMonjon, 113 Fed. (2) 535;
In re Kalb, Feuerstein v. Kalb, 127 Fed. (2d) 509.

RESPONDENT'S PROPOSITION I

The first proposition argued by the respondent is that the petition to reopen was an application for rehearing of the order of dismissal entered January 4, 1938, and was therefore not appealable. The cases relied upon by the respondent, are *Brockett v. Brockett*, 43 U. S., (2 Howard), 238, and *Conboy v. First National Bank*, 203 U. S. 141, which involved applications for rehearing filed after the time for appeal had expired. We are not here concerned with *rehearing* but with reopening, or, in the alternative, with the right to invoke Sec. 75 while a right of redemption exists.

This Court, in *Wayne United Gas Company v. Owens-Illinois Glass Company*, 300 U. S. 131, had presented to it a much more similar case although that case too involved an application for rehearing which was filed after the time for appeal had passed and, in fact, after an appeal had been taken and dismissed. In note 2 to the opinion in that case, it was stated that "this Court had adverted to the question without deciding it" in *Conboy v. First National Bank* (Supra). This Court held that a Court of Bankruptcy had the power for good reason to revise its judgment upon a seasonable application before rights vested upon the faith of its action.

This Court recently, in the case of *Pfister v. Northern Illinois Finance Corp.*, U. S., Nos. 26, 27, October Term, 1942, decided November 16, 1942, (leave to file petition for rehearing granted), took occasion to review both the Conboy case and the Wayne United Gas Company case.

All of those cases relied upon by the respondent involved applications for rehearing of applications to set aside a particular order or decree of the Court. There is no such application here involved. We are not asking the Court to set aside the original order of dismissal dated January 4, 1938. We are merely asking the Court to exercise the jurisdiction and duty expressly vested in it by section 2 (8) of the Bankruptcy Act to reopen the case for good cause shown, and to permit the farmer debtor to invoke the provisions of Section 75 while her right of redemption exists.

Respondent cites two cases arising under section 75 of the Bankruptcy Act, which we think are not applicable to this case. The first case, *Mintz v. Lester*, 95 Fed. (2) 590, was clearly correct. In that case, there was an order dismissing the farmer-debtor petition on December 20, 1935. No further action was taken until April 21, 1937, at which time there was a motion filed seeking a rehearing of the motion to dismiss and a reconsideration of the action of the Court in dismissing the proceedings. This motion was denied on May 10, 1937. On May 18, the debtor filed a petition for rehearing of the order of May 10, 1937, which was denied on May 20, 1937. More than thirty days after the order of May 10, 1937, the bankrupt filed a motion in the Circuit Court of Appeals praying an appeal only from the order of May 20, 1937 as set out in note 1 of the opinion, the motion for appeal read in part as follows:

> "Comes now Minnie E. Mintz, bankrupt . . . and prays that she be granted an appeal from the final order of the District Court of the United States for the District of New Mexico, denying her motion for rehearing on the motion to dismiss filed by Francis E. Lester, and George M. Clark, on December 2, 1935; and which final order of said Court was filed herein on May 20, 1937."

The right of appeal from the order of May 10, 1937, had expired and there was no right of appeal from the order of May 20, 1937 because it was merely a denial of a rehearing, which is not appealable.

The other case relied upon by the appellant is *Chapman v. Federal Land Bank*, (111 Fed. (2d) 321). The facts in that case down to the time of dismissal, are somewhat similar to those here involved, for the motion to dismiss was identical with that filed by the respondent in this case. There, as here, the farmer-debtor proceedings were dismissed because the offer did not present a feasible method of financial rehabilitation. There were two cases pending, one of them by the administrator of the farmer, in whom the right to file such proceedings was expressly vested by section 75 (r), and an identical proceeding filed by the heirs of the deceased farmer. The administrator appealed from the order of dismissal and in the decision relied upon by respondent, the rights of the administrator under section 75 were given full recognition. This being true, the proceeding of the heirs presented an entirely moot question for the relief sought had already been obtained.

We might further call to the Court's attention the fact that this Chapman case definitely recognized the error of the District Court in its original order of dismissal, thus sustaining the right of the farmer-debtor to the benefits of sub-section (s) on the ground of reasonable lack of probable financial rehabilitation. The simple distinction remains that in that case there was presented to the Court no motion or petition to reopen the proceedings under section 2 (8) of the Bankruptcy Act.

RESPONDENT'S PROPOSITION II

It is next argued that the petition to reopen was addressed to the sound discretion of the District Court under its general equity powers, not under section 2 (8) of the Bankruptcy Act. The respondent relies upon the case of *Miller v. Mangus*, 125 Fed (2) 507. The decision in that case is no longer of any help to the respondent for this Court on December 7, 1942, reversed the decision of the Circuit Court of Appeals in *Mangus v. Miller*, —U. S.—.

That the discretion of the District Court to reopen a closed estate is a matter of judicial discretion which may and should

be reversed for abuse of discretion is sustained by the case of *In re Perlman*, 116 Fed. (2) 49, cited in the respondent's brief. Respondent is wrong in stating that in the Perlman case the Circuit Court of Appeals declined to disturb the action of the District Court. Exactly the contrary result was reached. There the Circuit Court of Appeals went fully into the facts shown by the record and held that the action of the District Court was an abuse of discretion and reversed the action of the District Court.

Likewise, in the case of *In re Butts*, 123 Fed. (2d) 250, cited by the respondent, the Circuit Court of Appeals considered fully the facts, but in that case reached the conclusion that no abuse of discretion had been shown.

Such a motion to reopen a case in the Bankruptcy Court "for good cause shown" does, we submit, call for a judicial discretion, and the exercise of judicial or legal discretion is not an unbridled discretion. Any other conclusion would make the rights of farmer-debtors and other parties having business in the Bankrupt Court, depend upon the length of the chancellor's foot rather than upon the legal and statutory rights. We submit that at no time does a District Court have a discretion to act contrary to the plain terms of the statute as construed by this Court in the Bartels case. *Peterson v. John Hancock Mutual Life Insurance Co.*, (C. C. A. 8th) 116 Fed. (2d) 148; *Stetson v. Stindt*, C. C. A. 3rd, 279 Fed. 209, 212; *Winchester Repeating Arms Co.*, C. C. A. 7th, 203, Fed., 493, 494; *C. F. Carpenter v. Wabash Railway Co.*, 309 U. S., 23, 29, 84 L.ed. 558.

We, of course, concede that a motion to reopen filed under Section 2(8) of the Bankruptcy Act is not a matter of right but is addressed to the sound legal discretion of the Court. We submit, however, that no better cause for reopening can be shown than is here shown, that is, the denial to the farmer-debtor of the plain right accorded to her by the Act of Congress. This right was denied to her by the District Court under an erroneous interpretation of the law. Immediately after this Court, in the Bartels' decision (308 U. S. 180) had resolved the

conflict between the existing decisions in the Fifth Circuit Court of Appeals, and therefore immediately after her rights became definite and certain, petitioner filed her motion to reopen the case. This, we submit, was "good cause shown" and the denial of the motion was an abuse of discretion.

This, we respectfully submit, is made plain by the grounds assigned by the Circuit Court of Appeals in affirming the judgment of the District Court. The District Court, in holding that petitioner had not met the requirements of the Wayne Gas Company case, gave consideration to two things, first, that the petitioner was required to act promptly (R. p. 44), and second, the rights of a third party had intervened. The Circuit Court of Appeals, in affirming this decision, concedes, without deciding, that the petition was filed in due time and no intervening rights had become vested. (R. p. 59.)

The Circuit Court of Appeals gives weight to the following facts and as to each statement we cite the opinion of this Court with which such statement by the Circuit Court of Appeals is in direct conflict:

(a) "The petition for reinstatement was filed one day prior to the expiration of the statutory period of redemption." The farmer-debtor petition involved in *Wright v. Logan*, 315 U. S. 139, was likewise filed a day before the expiration of the right of redemption but this Court did not hold that that fact was sufficient to deny the rights given by the statute. In fact, however, the Wragg petition was not filed within one day but within 6 weeks, lacking one day of the expiration of the period for redemption.

(b) "At that time, appellant had been privileged to retain possession of her property for five years without making any payment on the mortgage and had been out of possession approximately a year."

This Court, in both *Wright v. Logan*, 315 U. S. 139, and *Borchard v. California Bank*, 310 U. S. 311, clearly held that farmers could not be deprived of the benefits of the Act because the

Court might believe that a farmer had received the equivalent of what it prescribes.

(c) "Her petition did not allege that her financial condition had undergone any change or that a further stay of proceeding would be likely to result in her financial rehabilitation." This Court, in the Bartels case, 308 U. S. 180, at page 184, had clearly settled, we thought, that the subsections of Section 75 contained no provision for the denial to the farmer-debtor of the benefits of the statute because of the absence of a reasonable probability of the financial rehabilitation of the debtor.

(d) "The third party purchased the land, having good reason to believe the bankruptcy proceedings brought by the appellant had been ended by final decree. He had the right to expect, in the absence of his own fault, to use and enjoy the property purchased without molestation unless as provided by Alabama law, the former owner exercised her right of redemption within two years and tendered to him the purchase price of the property with interest, costs, and the reasonable value of improvements."

This statement by the Circuit Court of Appeals, we submit, is in direct conflict with the decision of this Court in the first case of *Wright v. Union Central Life Insurance Company*, 304 U. S. 502, 514. It was there held: "the debtor has a right of redemption of which the purchaser is advised and until that right of redemption expires, the rights of the purchaser are subject to the power of the Congress over the relationship of debtor and creditor, and its power to legislate for the rehabilitation of the debtor. The person whose land has been sold at foreclosure sale and now holds a right of redemption is, for all practical purposes, in the same situation as an ordinary mortgagee in default; both are faced with the same ultimate prospect either of paying a certain sum of money or being completed divested of their land."

We think the provision for the extension of the period of redemption comes clearly within the power of the Congress under the Bankruptcy clause . . . Any purchaser at a judicial sale

must purchase subject to the possibility of the exercise of the Bankruptcy power in a manner consummate with the fifth amendment."

Here the so-called purchaser, Storrs, made a contract expressly subject to the right of redemption. (R. p. 39.) Under the above decision the provisions of Section 75 were written into that contract and the purchaser took not only with the knowledge of the statutory right of redemption but with the knowledge that such statutory right of redemption might be extended for the period necessary to carry out the purposes of the farmer-debtor law.

CONCLUSION

Petitioner feels that without question, the right of redemption in Alabama is included in the provisions of Section 75 of the Bankruptcy Act, and under the alternative averment of the petition she is entitled to the relief which she seeks.

Petitioner also feels that she is entitled to have the case reopened. The estate was not completely administered. The right of redemption was at all times an asset of value. Petitioner was entitled to the benefits of subsection *s*. The Court erroneously refused them to her. She did everything in her power to secure consideration by the Circuit Court. This was denied because the District Judge felt that her proposed plan was not feasible and that her appeal was not in good faith. There was, apparently, no question as to her lack of funds. The Court had a list of all her assets. Respondent argues that if the appeal were not perfected, it is the same as if there had been no appeal. Petitioner does not agree with this.

Without question in the broad sense, petitioner's rights were denied, at least in part, because of respondent's misleading argument to the District Court. Petitioner did everything in her power to secure her rights. She now comes in and shows that the only person who will benefit by refusal to reopen this estate will be the respondent bank which is partly responsible for

the Court's error. No rights of a third party have intervened. Storrs took under a contract which entitled him to possession four days after this petition was filed. Even if he had been in possession for some time, he nevertheless took all his rights subject to being dispossessed by exercise of the right of redemption.

Respondent's position is that it helped create the original error and that now because 2 years have elapsed, the error should be perpetuated for respondent's benefit. Petitioner submits that she has acted promptly and that no rights of a third party have intervened. Petitioner prays that her case be reopened.

Respectfully submitted,

JACK CRENSHAW,
Montgomery, Alabama.
WALTER J. KNABE,
Montgomery, Alabama.
ELMER McCLAIN,
Lima, Ohio.
Attorneys for Petitioner.

I, Walter J. Knabe, hereby certify that I have on this ..... day of Deeember, 1942, mailed, postage prepaid, a copy of the foregoing brief to Honorable Thomas Harvey Hedgepeth, 860 St. Charles Street, New Orleans, Louisiana, attorney for respondent.

.....

WALTER J. KNABE.